STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

April 1, 1996

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems CS Docket No. 96-46

Dear Secretary Caton:

Enclosed are an original and 11 copies of the comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

John L. Grow /kal

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Special Counsel - Cable

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Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
Open Video Systems	)	

COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service ("NYDPS") submits these initial comments in response to the Notice of Proposed Rulemaking ("NPRM") in this docket regarding rules to implement new Section 653 of the Communications Act relative to the delivery of video programming through an open video system ("OVS").[1]

In the Commission's video dialtone proceedings, NYDPS stated its support for federal legislative initiatives that would create opportunities for the competitive delivery of video programming services by telephone companies. In that context, we stressed the need for a level playing field during the transition

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[1] At the outset, it is noted that this proceeding will mark the first occasion on which NYDPS will be submitting comments to the Commission in its joint capacity as a state commission pursuant to Section 3(41) of the Communications Act, as amended, and a cable television franchising authority pursuant to Section 602(10) of the statute. On January 1, 1996, the responsibility for administering provisions of New York State statute pertaining to cable television were transferred from the Commission on Cable Television to the NYDPS. The legislative history of Title VI of the Communications Act makes clear that a state agency such as NYDPS that must approve franchise agreements between municipal governments and cable operators is a franchising authority.

period to full competition and urged the Commission to require telephone companies to provide video programming through separate subsidiaries subject to defined and consistent cost allocation guidelines in order to ensure against the use of telephone service revenues for video transport facilities or video programming. We also expressed the view that disparate regulatory treatment of the two industries would undermine sound public policy decision making.

Congress has acted and telephone companies are now free to deliver multiple channels of video programming by wire in their telephone service areas in one or more of four separate capacities: (1) as a cable operator subject to Title VI; (2) as a common carrier subject to Title II; (3) as a satellite master antenna TV system operator essentially free of regulation; and (4) as an OVS operator subject to some, but not all, of the provisions of Title VI.[2]

We are hopeful that those opportunities will create competition in the market for the delivery of multichannel video programming by wire and will enhance competition in the video programming market generally. It is apparent, however, that the various options implicate different regulatory standards administered at different levels of government and that the formidable task for the Commission and state regulators alike is to maintain a level playing field during the transition to

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[2] Telephone companies are also now able to provide video programming in their local service area by wireless technologies.

competition in video and telecommunication services regardless of the option a telephone company may choose to enter the video programming and distribution markets. With respect to OVS, in particular, the challenge for the Commission in this rulemaking is to promulgate rules that will maintain a balance between OVS eligibility and operational requirements and the full range of objectives for video and telecommunication as set forth in the Telecommunications Act of 1996.[3]

As a general matter, the rules adopted in this proceeding should be carefully and narrowly crafted so as to clearly distinguish the regulatory characteristics of an OVS operator from those of a cable operator and a telecommunications carrier in a manner consistent with traditional non-federal interests in public, educational and governmental ("PEG") access channels and the management of public streets and rights-of-way and state jurisdiction over intrastate communications.

More specifically, NYDPS supports final rules in respect to matters of state and local interest that would (1) confine the opportunity to qualify for OVS status to local exchange carriers ("LECs"); (2) recognize the opportunity for cable operators to distribute programming on OVS channels subject to limitations in the event that third party demand for channels does not exceed capacity; (3) minimally require that an LEC

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[3] See, e.g., Section 257(b) stating the national policy underlying the new statute as "favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public convenience, interest and necessity."

certification include (a) a description of the proposed location and capacity of the distribution facilities including whether such facilities are intended to be used for interactive video or non-video services, (b) proof of publication of a notice of the availability of channel capacity to unaffiliated entities for the distribution of video programming and the amount and status of the demand for such capacity; (c) proof of service of notice of intent to seek certification upon each franchising authority and state commission with jurisdiction over the area(s) to be served, together with a statement that, if certified, the LEC will not commence the provision of video programming unless all existing PEG channels (as required in an existing cable franchise) are available to subscribers; and (d) proof of notification as required by Section 224(h), if applicable.

In addition, Commission rules would enhance OVS as a practical alternative if they provide (1) that the OVS operator may select the programming on one-third of the entire capacity of the system; (2) that the OVS operator must offer reasonable cost-based rates for channels on both a per-channel and group basis, and provide billing and other services necessary to make subscriptions to any channel or package of channels a practical alternative for the subscriber; (3) that the OVS operator may agree to carry unaffiliated programming services by contract and market such programming services together with its own, provided that it shall not obtain a vested interest in more than one-third of such channels regardless of demand; (4) that OVS operators may

participate in channel allocation and in the selection of programming to be provided on shared channels; and (5) that disputes may be resolved by state regulators in lieu of the Commission should the parties so elect.

Finally, NYDPS supports a separate rulemaking concerning cost allocation issues.

A. OVS OPERATOR vs. CABLE OPERATOR

An OVS is now one of five exemptions in the definition of "cable system" in Section 602(7) of the Act. It is the only exempt system that involves the exercise of editorial control over video programming by the system owner and use of public rights of way. The statute contains no separate definition of an OVS, as such, and it should be assumed that an OVS will be technically indistinguishable from a state-of-the-art cable system. Indeed, the primary distinguishing feature of an OVS compared to a cable system is the greater percentage of channels which the OVS operator must make available to unaffiliated third parties.[4] Accordingly, it is critical that the rules ensure that channel capacity is freely and fairly available and that they contain specific requirements by which an OVS operator's obligations to make channels available on a non-discriminatory basis on reasonable rates, terms and conditions may be monitored. The rules should also ensure that OVS status not impact the

[4] Cable operators are limited to 40% of their channel capacity for the delivery of affiliated programming and must reserve up to 15% of their capacity for commercial leased use.

jurisdiction of a state commission over the use of such system for intrastate communications.

B. ELIGIBILITY FOR OVS STATUS

In paragraph 64 of the NPRM, the Commission asks whether cable operators and others may be OVS operators. It is clear from both the title and the language in new Part V of Title VI as well as the legislative history that Congress intended for OVS status to be available exclusively to LECs. The only basis for a claim to the contrary is the sentence in Section 653(a)(1) which states that "a cable operator (or any other person) may provide video programming through an open video system." This language is in contrast to the first sentence in the same subsection which describes the OVS opportunity for a LEC as the provision of "cable service to its cable subscribers in its telephone service area through an open video system that complies with this section." The difference between the more specific authority to provide cable service to subscribers and the general authority to provide video programming is consistent with the plain language throughout the balance of new Part V of Title VI that non-LEC entities are not eligible for OVS status.

The Commission asks at paragraph 15 whether an OVS operator should be permitted to limit or preclude a competing cable operator from using channel capacity on the OVS system. As noted, the statute does not bar a cable operator from providing video programming on an OVS system. As a practical matter, however, if a LEC provides notice of intent to construct an OVS

and no demand for capacity is received except from the competing cable operator, the amount of channel space available to the cable operator should not exceed that which is available to the LEC. Such a rule is necessary to preserve the intent of Congress, as noted by the Commission, that OVS be a means for promoting both inter-system and intra-system competition in the video programming market.

In addition, we note that there is nothing in the statute that would preclude an OVS operator from converting, at any time, to the status of cable operator and the opportunity to control more channels by obtaining a franchise.

C. CERTIFICATION

By requiring Commission action within ten days of receipt of a request for certification, Congress did not intend that the certification process present an opportunity for the resolution of all issues pertaining to the statutory requirements for eligibility to obtain OVS status.

In paragraph 68 of the NPRM, the Commission seeks comment on the proper point in time for certification. In paragraph 69, the Commission seeks comment on the documentation that should be submitted in support of an OVS certification. Clearly, certification must precede the actual commencement of the delivery of video programming directly to subscribers in order that an LEC not be found to be operating a cable system without a franchise contrary to Section 621 of the Communications Act. More important than a specified date for submission of

certification is a requirement the certification request include proof of service of appropriate notices on affected parties and other fundamental information. For example, it is essential that the LEC seeking OVS status provide notice of its intent to establish and operate an OVS system to state and local franchising authorities and state commissions in order that they might take the appropriate steps at an early date to ensure compliance by the OVS with Section 653(c)(1)(B) relative to PEG access and Section 653(c)(2)(B) relative to competitively neutral fees. Additional minimal documentation would include proof that notice of the availability of channels was given to potential video programmers and the status of the initial requests for channel capacity and proof of notice to users of the LEC's poles, conduits, etc., in fulfillment of Section 224(a). The LEC must also demonstrate preliminary efforts to comply with Sections 613 and 614 of the Communications Act relative to local broadcast station must carry requirements.

Paragraph 70 of the NPRM seeks comment on whether a LEC should be required to file appropriate amendments to its Cost Allocation Manual in the OVS certification process. The Cost Allocation Manuals will have to be modified to include the non-regulated open video costs, however, this process should be established in a rulemaking to determine proper allocation procedures and need not be spelled out as separate requirement for certification. Accordingly, we express our support for the Commission's decision to establish a separate rulemaking to

address the modifications to Part 64 that will be required to properly allocate open video systems as well as addressing other industry issues.

D. PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS

Pursuant to Section 653(c)(1)(B), an OVS operator must designate channel capacity for PEG use as may be required by the franchising authority. The Commission seeks comments in paragraphs 57 and 58 of the NPRM on the practical issues involved in implementing this requirement. As an initial matter, the LEC should be obligated to carry the same PEG access channels that are available in the franchise area. The Commission asks whether the OVS operator should be required to duplicate an incumbent cable operator's obligation relative to PEG access support. Absent any agreement involving the franchising authority, the LEC and the cable operator to the contrary, the OVS operator should be subject to the same terms and conditions applicable to the cable operator in an existing franchise.

In paragraph 58, the Commission asks specifically how it should implement Section 611 where the proposed service area of an OVS operator transcends multiple franchise areas with differing PEG access requirements. With state-of-the-art technology, including, in particular, fiber to local node architecture, it is now technically feasible for cable systems to provide distinct channels to individual franchise areas served by the same headend. It should be expected that any construction of video distribution facilities by LECs will employ such technology

and that this issue with respect to channel capacity alone should not pose a significant problem.

Finally, with respect to PEG access channels, the Commission asks how PEG channels should be made available so that they are received by all subscribers. In order to maintain a level playing field, NYDPS suggests, for now, that the most practical disposition of this issue is to require the OVS operator to certify that PEG (and must carry) channels will be part of every service option and, therefore, be available to each and every subscriber.

E. OPERATIONAL ISSUES

In paragraph 19 of the NPRM, the Commission tentatively concludes that PEC and Must Carry channels should not be counted against the number of channels for which an OVS operator can select the programming. In paragraph 11, the Commission proposes to allow LECs to participate in the allocation of channel capacity and in paragraph 27, that LECs may meet their obligation to carry unaffiliated programmers by agreement to market such services to subscribers. We can support those tentative conclusions as practical policies that would tend to enhance the likelihood that the video distribution facilities can be commercially practicable.

Section 653(A)(2) of the statute requires the FCC to entertain and resolve disputes under the statute and the Commission's regulations. We suggest that in states like New York, disputes that might arise between OVS operators and

municipal franchising authorities should be subject to resolution by the State Commission.

CONCLUSION

An OVS operator is a new and untested concept for the delivery of video programming by wire to the home. The concept is broadly designed by Congress to create an alternative means whereby a local exchange carrier may invest in broadband infrastructure and enter the video programming market as a content provider in its own telephone service area. The OVS model is also designed to promote additional opportunities for video programmers to enter and compete in the local video programming market. NYDPS submits that the comments herein will foster a specific regulatory framework for OVS that is consistent with these statutory objectives and will contribute to a level playing field during the transition to competition in the local video programming market.

Respectfully submitted,

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